Filed 4/1/05 In re E.J. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re E.J., a Person Coming Under the Juvenile Court Law.	C047326
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. ARTHUR P. et al., Defendants and Appellants.	(Super. Ct. No. JD218438)

Arthur P. and Diane J., parents of the minor, appeal from orders of the juvenile court terminating their parental rights and freeing the minor for adoption. (Welf. & Inst. Code, §§ 366.26, 395.)[1] Appellants contend the court erred in concluding they had not established the benefit exception to

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

adoption, there was insufficient evidence the minor was likely to be adopted, the minor's counsel provided the minor inadequate representation, and the Sacramento County Department of Health and Human Services (DHHS) failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We affirm.

FACTS

DHHS removed the six-year-old minor from the mother's custody in August 2002 because of the mother's substance abuse problems and her failure to benefit from family maintenance services. The minor had no special needs or behavioral problems, was healthy and alert, and had adapted well to his foster home, but he did not know basic fundamental information expected of a child his age. The minor expressed a desire to go home and "take care of his mom."

The mother claimed Cherokee Indian heritage, and the father claimed Cherokee and Apache Indian heritage. The mother was not enrolled in a tribe and did not know her grandparents' names. The father did not believe either of his grandparents (the minor's paternal great-grandparents) was registered with a tribe and could not identify a specific tribal affiliation. DHHS sent notices of the dependency proceedings (SOC 319) and a request for confirmation of the child's status (SOC 318) to the relevant Cherokee and Apache tribes in September 2002. The SOC 318 stated that the paternal great-grandparents were not enrolled in a tribe, noted the dearth of information available from the

mother, and stated that a copy of the petition was available on request.

Responses were eventually received from all the tribes indicating the minor was not an Indian child.

At disposition, the court ordered services only for the mother and the minor was briefly returned to her care, only to be removed a few months later. In March 2003 DHHS placed the minor in a foster home that could also offer permanency if necessary. At that time, the court adopted reunification plans for both parents.

By the 12-month review hearing, appellants had failed to reunify with the minor, although the mother did attend the ongoing weekly supervised visits and appeared to have a close relationship with the minor. The court terminated services and set a section 366.26 hearing.

The assessment for the section 366.26 hearing recommended termination of parental rights. According to the assessment, the mother continued to attend weekly supervised visits. However, while there was a bond between the mother and the minor, in the opinion of the social worker who had observed several visits, it was not a healthy one as the minor demonstrated parentified behaviors toward the mother and the mother engaged in behaviors designed to encourage the minor to meet her needs, instead of focusing on meeting the minor's needs. The minor, who remained healthy and developmentally on target, was doing well in his foster home. He was emotionally stable, above-average in school, and in therapy to address

separation from the mother. The prospective adoptive parents had completed a home study, and the minor had been living with them for almost a year. The family was aware of the minor's relationship and bond with the mother and intended to continue visits between them provided the interaction was in the minor's best interests.

A bonding assessment stated that there was an overall positive emotional attachment between the mother and the minor and there would be some emotional detriment if contact between them was severed. However, in the psychologist's opinion, the detriment would be outweighed by the well-being the minor would gain in a permanent home. If parental rights were terminated, the psychologist recommended continued counseling for the minor to address his sense of responsibility toward the mother and his feelings of guilt for not being there to take care of her.

At the section 366.26 hearing, the minor testified he did not want to be adopted because he would be sad if he had no visits with the mother. On cross-examination he testified it would be okay if his current caretakers adopted him, but he would still miss his "real mom." He explained that if he lived with the mother he could help her take care of him by making good choices about his needs. The minor's counsel, referring to his duties under section 317, informed the court that the minor had repeatedly told him he did not want to be adopted. However, counsel recognized his duty to advocate in the minor's best interest and argued for a permanent plan of adoption, noting

that the relationship between the mother and the minor was parentified and not a normal parent-child relationship.

The court stated there was a bond between the mother and the minor that should continue and was convinced the current caretakers would allow it to do so. The court further stated that the minor's wishes were clear but did not control the outcome of the hearing. The court found that the benefit of continued contact between the mother and the minor was outweighed by the benefit to the minor of a permanent home, terminated parental rights, and selected a permanent plan of adoption.

DISCUSSION

I

Appellant contends substantial evidence did not support the court's finding the minor was adoptable because there was no evidence the prospective adoptive parents were aware the minor did not want to be adopted.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing court must determine if there is any substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- to support the conclusion of the trier of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination we recognize that all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are

questions for the trier of fact. (*In re Jason L.*, *supra*, 222 Cal.App.3d at p. 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.) The reviewing court may not reweigh the evidence when assessing its sufficiency. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Determination of whether a child is likely to be adopted focuses first upon the characteristics of the child. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) The existence or suitability of the prospective adoptive family, if any, is not relevant to this issue. (*Ibid.*; *In re Scott M.* (1993) 13 Cal.App.4th 839, 844.) "[T]here must be convincing evidence of the likelihood that adoption will take place within a reasonable time." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.) The fact that a prospective adoptive family is willing to adopt the minor is evidence that the minor is likely to be adopted by that family or some other family in a reasonable time. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.)

The minor was healthy, developmentally and scholastically on target, and happy and adjusted in the home of the prospective adoptive family. Although he was somewhat older than many children found to be adoptable, he had no special medical, developmental, emotional, or behavioral needs and had done very well in the placement. The prospective adoptive parents were necessarily aware that the minor was in therapy regarding separation issues and that those issues could continue to impact him. The minor's testimony demonstrates his ambivalence about adoption, which is to be expected of a parentified child. Even

if the prospective adoptive parents were not specifically aware that the minor had stated he did not want to be adopted, an assertion for which there is no evidence, there is nothing in the minor's makeup that suggests he is not adoptable. Moreover, as the court observed, the minor's wishes are not controlling in this case. Ample evidence supported the court's finding that the minor was likely to be adopted within a reasonable time.

II

Appellants contend the court erred in failing to find the benefit exception (§ 366.26, subd. (c)(1)(A)) applied in this case and improperly relied upon evidence that the current caretakers would permit continued contact after adoption.

"'At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption*. [Citation.]' [Citation.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.) There are only limited circumstances that permit the court to find a "compelling reason for determining that termination [of parental rights] would be detrimental to the child." (Welf. & Inst. Code, § 366.26, subd. (c)(1).) The party claiming the exception has the burden of establishing the existence of any circumstances that constitute an exception to termination of parental rights. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243,

1252; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373; Cal. Rules of Court, rule 1463(d)(3); Evid. Code, § 500.)

One of the circumstances in which termination of parental rights would be detrimental to the minor is: "The parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) The benefit to the child must promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) Even frequent and loving contact is not sufficient to establish this benefit absent a significant positive emotional attachment between parent and child. (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728-729; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419; *In re Brian R.* (1991) 2 Cal.App.4th 904, 924.)

The mother has not met her burden of demonstrating that the exception applied in this case. Although she maintained regular contact with the minor, she did not establish that continued contact with her would be beneficial to the minor. The evidence

showed that the parent-child bond, although significant, was not entirely a positive one. The mother manipulated the minor to meet her needs and the minor reacted with parentified behaviors toward the mother; he sought to care for her and to help her care for him by making good choices, thereby relieving her of the responsibility of making good choices herself. Even the bonding study recommendations recognized therapy would be needed to deal with the minor's sense of responsibility toward the mother. Further, the bonding study concluded that while severing the parent-child bond would result in some emotional detriment, the detriment was outweighed by the benefit to the minor of a permanent, stable home.

Although expressing both a desire that the parent-child bond continue and a belief that the prospective adoptive parents would allow it to, the court unequivocally found that the benefit of continued contact was outweighed by the benefit to the minor of permanency. Substantial evidence presented to the court fully supported the finding.

III

Appellants assert that the minor's counsel's representation at the section 366.26 hearing was inadequate. They argue that although counsel did present his client's wishes, he also argued against his client's position on termination of parental rights.

"A primary responsibility of any counsel appointed to represent a child . . . shall be to advocate for the protection, safety, and physical and emotional well-being of the child." (§ 317, subd. (c).) "The counsel for the child shall be charged

in general with the representation of the child's interests." (§ 317, subd. (e).) "He or she may . . . make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately represent the child. In any case in which the child is four years of age or older, counsel shall interview the child to determine the child's wishes and to assess the child's well-being and shall advise the court of the child's wishes." (*Ibid.*)

Minor's counsel has a complex and delicate job. A minor's wishes on a particular issue may not be in the minor's interests and may not constitute a choice that will protect him or her, keep him or her safe, or further his or her emotional or physical well-being. In such a situation, counsel may, and indeed should, consonant with the duties delineated in section 317, both inform the court of the minor's wishes and advocate for the minor's interests with a view to protection of the minor. (See *In re Candida S.* (1992) 7 Cal.App.4th 1240, 1253.)

Counsel's actions were precisely within the requirements of section 317. By both informing the court of the minor's expressed wishes not to be adopted and arguing that the minor's interest in safety and well-being dictated the need for a permanent and stable home, counsel fulfilled his duties to his client. No inadequacy appears in counsel's representation.

IV

Appellants argue DHHS failed to comply with the notice requirements of the ICWA in that the petition was not attached to the SOC 319 notice and the SOC 318 form incorrectly stated that the paternal great-grandparents were not enrolled with a tribe rather than that the specific information was unknown.

The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the Bureau of Indian Affairs if the tribal affiliation is not known. (25 U.S.C. § 1912; Cal. Rules of Court, rule 1439(f).)

Federal regulations and the federal guidelines on Indian child custody proceedings both specify the contents of the notice to be sent to the tribe in order to inform the tribe of the proceedings and assist the tribe in determining if the child is a member or eligible for membership. (25 C.F.R. § 23.11(a), (d), (e); 44 Fed.Reg. 67588 (Nov. 26, 1979).) If known, the agency should provide the name of the child; the date and place of birth of the child; and the tribe in which membership is claimed; the names, birthdates, places of birth and death, current addresses, and tribal enrollment numbers of the parents, grandparents, and great-grandparents, as this information will

assist the tribe in making its determination of whether the child is eligible for membership and whether to intervene. (25 C.F.R. § 23.11(a), (d), (e); 44 Fed.Reg. 67588; *In re D. T.* (2003) 113 Cal.App.4th 1449, 1454-1455.) Further, the notice should contain, inter alia, a statement of the right to intervene, the right to counsel, the right to a continuance, and the addresses of the court and the parties, and should have a copy of the petition attached to inform the tribe of the nature of the pending proceedings. (25 C.F.R. § 23.11(a), (d), (e); 44 Fed.Reg. 67588.)

Obviously, the more accurate the information provided to the tribe, the more likely it is that the tribe will have adequate information for determining whether the minor is eligible for membership in the tribe. In this case, the court and DHHS were aware of possible Indian heritage at the outset of the case, promptly investigated, and sent notice to the Cherokee and Apache tribes. The notices, as appellants have observed, did not accurately reflect the information from the father that he did not believe the paternal great-grandparents were registered with a tribe, and no petition was attached to the notice.

We conclude the error in failing to comply precisely with the notice requirements is harmless. (Cal. Const., Art VI, § 13.) The statement in the SOC 318 that the paternal great-grandparents, whose names were provided, were not enrolled in a tribe would not have deterred the tribe from its investigation of the names submitted to it. Similarly, failure to provide a

petition cannot have been fatal to the notice because the SOC 318 clearly stated that a petition was available upon request. Since none of the tribes found the minor was eligible for membership, and the petition did not contain any additional genealogical information that would have assisted the tribe's investigations, it is inconceivable that failure to attach the petition rather than merely making it available to the tribe had any impact on the determination that the minor was not an Indian child.

DISPOSITION

The orders of the juvenile court are affirmed.

RAYE, Acting P.J.

We concur:

HULL, J.

ROBIE, J.